BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERTO MAGANA	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 236,071; 241,633
	)	& 256,300
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the June 11, 2003, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 2, 2004.[1]

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the November 20, 1998, preliminary hearing transcript and the March 16, 2001, preliminary hearing transcript. In addition, at oral argument before this Board, the parties stipulated the July 11, 2000, medical report by Dr. Sergio Delgado was part of the evidentiary record.

ISSUES

The application for hearing filed in Docket No. 236,071 alleged a series of micro-traumas "ending with an identifiable injury on or about 9-18-97 and continuing each working day thereafter." The application, likewise, alleged injuries to claimant's right arm, right shoulder, right hand, neck and head from working in respondent's meat packing plant.

[1] The Board continued oral argument from December 9, 2003, to March 2, 2004, to allow the parties an opportunity to research and brief additional issues.

Claimant later filed an amended application for hearing to add injuries to the left shoulder, left arm, left hand and back.

In Docket No. 241,633, claimant's application for hearing alleged a series of micro-traumas commencing "about May of, 1998, and continuing each working day thereafter, and ending with an identifiable injury on or about 1-4-99 and continuing each working day thereafter." The application further alleged injuries to claimant's left shoulder, arm and wrist and upper back from washing belts.

Finally, the application for hearing filed in Docket No. 256,300 alleged a series of micro-traumas "commencing on or about January, 2000, and continuing each working day thereafter, and ending with identifiable injury on or about 4-11-00, 200_, and continuing each working day thereafter." Moreover, the application alleged injuries to claimant's back, neck, head and both shoulders from working in the meat packing plant.

But at the regular hearing, while delineating the stipulations and issues, the Judge noted September 18, 1997, as the accident date in Docket No. 236,071. And, likewise, the Judge stated January 4, 1999, was the accident date in Docket No. 241,633 and noted April 11, 2000, was the accident date in Docket No. 256,300. Neither party corrected the Judge when asked.[2]

On June 11, 2003, Judge Avery entered an Award in which he addressed all three docket numbers in the same document. In Docket No. 236,071, Judge Avery determined claimant hit his right elbow on a piece of steel on September 18, 1997, and that he was entitled to receive workers compensation benefits for a three percent functional impairment to the right upper extremity.

In Docket No. 241,633, Judge Avery determined claimant injured his left shoulder on January 4, 1999, while lifting a 20-pound piece of meat. For that injury, the Judge awarded claimant benefits for a three percent functional impairment to the left upper extremity at the shoulder level.

And, finally, in Docket No. 256,300, the Judge found claimant sustained a series of accidents that arose out of and in the course of his employment due to the repetitive nature of the work. Consequently, the Judge determined the appropriate date of accident in that claim was January 22, 2001, which was claimant's last day of working for respondent. Moreover, the Judge found claimant sustained a 42 percent task loss and a 100 percent wage loss, which created a 71 percent work disability (a permanent partial general disability greater than the whole body functional impairment rating).

[2] R.H. Trans. at 5-7.

Respondent requested review of the Judge's findings and conclusions only in Docket No. 256,300. Respondent argues claimant failed to prove that he sustained any accidental injury occurring on or after April 11, 2000, as after that date claimant only performed either light duty work or work that was approved by a doctor.

Respondent also argues that claimant did not prove he sustained any identifiable accident on April 11, 2000, as claimant had contended at regular hearing and he should be bound by that contention. Additionally, respondent argues claimant failed to provide timely notice of an April 11, 2000, accident and, likewise, failed to prove that he sustained any permanent impairment, wage loss or task loss from an April 11, 2000, accident. Accordingly, respondent requests the Board to deny claimant's request for benefits in Docket No. 256,300.

Moreover, respondent contends the Board lacks jurisdiction to review the Judge's findings and conclusions in either Docket No. 236,071 or Docket No. 241,633 as respondent's application for review did not include a request to review those claims and claimant failed to file a timely request for review.

Conversely, claimant argues all three docketed claims are subject to review as the claims are intertwined and, therefore, they were litigated and decided together. Claimant contends he initially injured his right upper extremity, neck and head and he, therefore, filed the first claim for compensation that was assigned Docket No. 236,071. Claimant also alleges the right upper extremity injury caused him to overuse and, consequently, injure the left upper extremity and his back, which prompted him to file the second claim, which was assigned Docket No. 241,633, and also file an amended application for hearing in the first claim.

Claimant further contends he aggravated his earlier injuries that were the subject of the first two docketed claims and he, therefore, filed the third claim for compensation that was assigned Docket No. 256,300. Nonetheless, claimant contends the award for work disability entered by Judge Avery was correct and that it could have been entered in the first two docketed claims as his ultimate injuries were a natural consequence of the injury to the right upper extremity. Consequently, claimant agrees with the Judge's ultimate finding of work disability. Claimant, however, disagrees that the awards entered in the first two docketed claims should be limited to scheduled injuries.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the findings and conclusions entered in Docket No. 236,071 and Docket No. 241,633 when the claims were decided in one document along with the claim in Docket No. 256,300, which was the only docket number listed in the application for Board review?

2. What is the nature and extent of injury and disability for the accidents and claims that are subject to review?

3. Did claimant provide timely notice for the alleged April 11, 2000, accident in Docket No. 256,300?

FINDINGS OF FACT

After reviewing the entire record, the Board finds, as follows:

1. Claimant alleges that he injured both upper extremities and shoulders, his neck and back while working for respondent in its meat packing plant. Unfortunately, claimant suffered a stroke in May 2001 that has adversely affected his memory. Accordingly, many of the details regarding claimant's alleged injuries and symptoms must be derived from the medical evidence that was introduced in these claims.

2. Despite his memory deficit, however, claimant did testify that his right upper extremity symptoms developed gradually when he was working in respondent's packing department. And that he recalled his left upper extremity symptoms began after he began handling meat with his left arm only. Although he could not recall the date, claimant remembered experiencing pain in his left arm while lifting a 20-pound piece of meat and recalled telling one of his doctors about that incident.

3. A more detailed history of claimant's symptoms was provided by Dr. James S. Zarr, who began treating claimant in April 1998. By that time, however, claimant had already seen two other doctors for treatment. According to Dr. Zarr, claimant (through an interpreter) reported an onset of pain near his right elbow after hitting his arm on a piece of steel while performing his duties as a packer. The doctor diagnosed right forearm extensor muscle strain and right lateral epicondylitis.

4. Dr. Zarr treated claimant with injections and in July 1998 determined claimant had reached maximum medical improvement. On July 21, 1998, the doctor wrote in his office notes that he was rating claimant and permanently restricting claimant from lifting more than five pounds and from doing repetitive activities with the right arm.

5. On July 28, 1998, claimant filed an application for hearing with the Division of Workers Compensation (Division) alleging injuries to his right arm, right shoulder, right hand, neck and head. The application for hearing, which was purportedly signed by claimant and his attorney, indicated claimant sustained a specific accident while working for respondent on September 18, 1997, but that he was also claiming a series of micro-traumas after that date. The Division assigned Docket No. 236,071 to that application.

6. In early September 1998, Dr. Zarr wrote respondent advising claimant had sustained a three percent functional impairment to the right upper extremity as measured by the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). The doctor was not asked and the doctor did not volunteer an opinion in either his medical notes or at his later deposition whether that functional impairment was caused by claimant striking his right elbow on a piece of steel or by claimant performing repetitive work and sustaining repetitive micro-traumas.

7. At claimant's attorney's request, in late September 1998 Dr. Lynn D. Ketchum examined claimant for purposes of providing recommendations regarding work restrictions and additional medical treatment. Claimant (through an interpreter) advised the doctor he had right upper extremity symptoms and, to a lesser extent, left upper extremity symptoms. The claimant told Dr. Ketchum, who specializes in plastic surgery and hand surgery, about striking his right elbow on a metal object approximately eight months after August 1994, when he commenced working for respondent. Claimant also told the doctor he had experienced pain in his right elbow and forearm following that accident which never really resolved as the symptoms had waxed and waned. Dr. Ketchum recommended a hinged-elbow brace and work restrictions of no lifting over 25 pounds or working over 40 hours a week.

8. Dr. Ketchum initially testified that in September 1998 claimant could not use his right upper extremity at work at all[3] and that he was developing left upper extremity symptoms due to overuse, which the doctor believed was a natural progression of the right upper extremity injury. But the doctor later testified that when he saw claimant in either September 1998 or 1999, claimant was continuing to use his right upper extremity at work.[4]

9. On November 3, 1998, Dr. Zarr saw claimant again for his right upper extremity. The doctor, noting claimant had recently undergone a functional capacity evaluation that yielded significant inconsistencies, rescinded the earlier restrictions against lifting more than five pounds and repetitively using the right arm as he released claimant to return to work without any restrictions.

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[3] Ketchum Depo. at 5-6.

[4] *Id.* at 45.

10. Also in November 1998, the Judge held a preliminary hearing in which claimant requested authorized medical treatment from Dr. Ketchum. By order dated November 23, 1998, the Judge granted claimant's request.

11. On January 11, 1999, the Division received an amended application from claimant in Docket No. 236,071 to add injuries to the left shoulder, left arm, left hand and back.

12. The following day, January 12, 1999, claimant returned to Dr. Zarr complaining of pain in his left arm, left shoulder and upper back, which claimant then attributed to a January 4, 1999, incident lifting a 20-pound piece of meat. The doctor diagnosed myofascial left shoulder and arm pain, prescribed oral medications, injections and physical therapy, and restricted claimant from lifting more than 10 pounds.

13. And in early February 1999, claimant filed another application for hearing with the Division alleging injuries to his left shoulder, arm, wrist and upper back. The application indicated claimant had sustained a specific accident on January 4, 1999, but that he had also experienced, and was continuing to experience, micro-traumas since approximately May 1998, which the document identified as the date that he had commenced working for respondent. The Division assigned Docket No. 241,633 to that application.

14. In February 1999, after not seeing Dr. Ketchum for approximately five months, claimant returned to the doctor. At that time, claimant told the doctor he had not been using his right arm at work but he was using his left arm 500 times an hour straightening meat on two conveyor belts. Claimant also told the doctor he was having problems with his neck that claimant attributed to reaching at work and that he was working up to 48 hours per week. The doctor recommended no reaching with the left upper extremity, rotating jobs every three to four hours, limit working to 40 hours per week with no overtime and limit lifting to three pounds. The doctor prescribed ketoprofen gel and wanted to see claimant again after the gel had an opportunity to work.

15. Meanwhile, Dr. Zarr continued to treat claimant's left upper extremity and the muscles around claimant's neck and left shoulder. On March 16, 1999, the doctor modified an earlier 10-pound lifting restriction and further restricted claimant from all lifting and from all assembly line work. But on March 30, 1999, despite claimant's ongoing symptoms, Dr. Zarr released claimant to return to work without restrictions because the doctor found no objective evidence that would warrant restrictions. That was the last time claimant saw this doctor.

16. On March 30, 1999, Dr. Zarr rated claimant as having a three percent functional impairment to the left upper extremity as measured by the AMA *Guides* (4th ed.). Again, the record does not disclose whether Dr. Zarr believed claimant's left upper extremity impairment arose solely from the January 4, 1999, incident lifting a piece of meat or whether claimant had also sustained injury to the left upper extremity due to either a series of micro-traumas or protecting the other arm. The doctor, however, at his deposition acknowledged he had received a January 11, 1999, letter from respondent stating claimant had reported pain in his left upper extremity that he attributed to overusing the left arm while the right arm was restricted from being used at work.

17. Although claimant had been released by Dr. Zarr, claimant continued to receive treatment from Dr. Ketchum. And in September 1999, claimant underwent a second functional capacity evaluation. That evaluation likewise indicated an inconsistent effort. But Dr. Ketchum did not believe claimant was malingering or magnifying his symptoms. Instead, the doctor concluded claimant was a good candidate for ongoing therapy for his myofascitis and his neck and back complaints.

18. In early October 1999, Dr. Ketchum wrote respondent and provided his opinion of claimant's permanent work restrictions and functional impairment rating. Dr. Ketchum diagnosed claimant with bilateral bicipital tendinitis, lateral humeral epicondylitis, and trigger fingers (also known as constrictive flexor tenosynovitis) in both hands with decreased range of motion and grip strength.

19. Utilizing the AMA *Guides* (4th ed.), Dr. Ketchum rated claimant in October 1999 as having a 25 percent functional impairment to the right upper extremity and a 22 percent functional impairment to the left upper extremity, which comprised a 26 percent whole body functional impairment.

20. Dr. Ketchum also concluded claimant should restrict repetitive gripping to no more than 30 percent of the work shift, limit lifting to less than 15 pounds on an occasional basis, not work in hot water all day and being in warm water every 15 minutes was permissible. The doctor testified he forwarded those restrictions to respondent in October 1999 when he provided respondent with his opinion regarding claimant's impairment rating, although the restrictions were written on a document purportedly signed on May 23, 2000.[5]

21. In October 1999, Dr. Ketchum advised respondent that claimant was permitted to do the job of "pick lean from bone belt." And in February 2000, the doctor advised

[5] Ketchum Depo. at 12; *Id.*, Ex. 2.

respondent claimant was approved for the job of "skinner helper." And, likewise, in either December 2000 or January 2001, the doctor reviewed a videotape and advised respondent claimant could perform the job of "bag rib fingers." The doctor testified at his deposition, however, that the only way to really determine whether claimant could perform that work was for him to attempt it.

22. In early December 1999, claimant saw Dr. Nathan Shechter. The doctor diagnosed bilateral bicipital tendinitis and bilateral humeral (lateral) epicondylitis, which he rated as constituting a 25 percent functional impairment to the right upper extremity and a 20 percent impairment to the left upper extremity, which comprised a 25 percent whole body functional impairment as indicated by the AMA *Guides* (4th ed.). Moreover, the doctor concluded claimant's left upper extremity injury was the probable progression of the right upper extremity injury due to compensating for the injured right arm. As the doctor saw claimant one time in late 1999, there is no indication from Dr. Shechter's testimony whether claimant may have sustained additional injury or impairment after December 1999.

23. On June 1, 2000, claimant began receiving treatment for his neck and upper back from Dr. Jeffrey T. MacMillan. By September 2000, Dr. MacMillan had concluded claimant had a non-specific pain syndrome. In arriving at that conclusion the doctor considered a cervical MRI, which indicated a small central herniated disc between the fifth and sixth cervical vertebrae. But according to the doctor, the MRI merely showed a degenerative disc causing no impingement. Dr. MacMillan concluded claimant sustained no functional impairment to his neck under the AMA *Guides* (4th ed.). The doctor also believed claimant could perform the job of bagging rib fingers. Nevertheless, the doctor did determine claimant had lost the ability to perform some of his former work tasks.

24. In June 2000, claimant filed another application for hearing with the Division, which created Docket No. 256,300. In that application, claimant alleged injuries to both shoulders, his back, neck and head. The application alleged a specific accident on April 11, 2000, along with a series of micro-traumas from January 2000 through each workday after that date.

25. Claimant saw another doctor, Dr. Sergio Delgado, for a second opinion regarding possible neck surgery. Upon a referral from his attorney, claimant saw Dr. Delgado in July 2000 and provided the doctor the following history, which is contained in the doctor's July 11, 2000, report:

> Mr. Magana is a 55 year old male employed at IBP, Inc., in Emporia, Kansas, where he has worked for five years. He worked initially in packing and developed right elbow complaints approximately in

> 1997. For this, he was treated with a diagnosis of a right lateral epicondylitis. He states that as a result of the injury sustained, he over compensated *[sic]* by using the left arm and he developed similar lateral epicondylar symptoms on the left elbow and the symptoms in both arms persist to this time and he has switched at work to janitorial and cleaning activities which he has performed since placed on restrictions following evaluation and treatment of his elbow injury.
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> He states that on April 11, 2000, he was lifting vats of residuals of processing which he estimates weighed somewhere between 100-150#. He lifted it and placed it on a separate surface and developed immediate pain in the neck with radiation of pain into the shoulder girdle, shoulder and arm regions. He also had radiation of pain into the mid thoracic area. He then developed increasing stiffness with cervical motion and spasm of his cervical musculature with pain not relieved by rest and for which he was evaluated initially by the plant physician and conservative care instituted but eventually an MRI of the cervical region was performed in view of lack of response to conservative care which showed a herniated disc at the C5-C6 level. This was a central disc with extension to both left and right sides. I have reviewed the MRI studies and agree with the interpretation of the MRI study by the radiologist.

Based upon his examination, Dr. Delgado concluded claimant's cervical symptoms were related to a herniated C5-6 disc and claimant's upper extremity symptoms were mostly related to the chronic epicondylitis in both elbows. Dr. Delgado did not attempt to rate claimant's cervical impairment but noted the best treatment for claimant would be to limit activities requiring heavy lifting, repetitive use of both upper extremities and alternating sitting and standing.

26. Dr. Ketchum last saw claimant in early January 2001. When the doctor testified on behalf of claimant in these claims, Dr. Ketchum testified he believed claimant injured his right upper extremity in a specific accident but then injured the left upper extremity by overuse. The doctor, however, did not believe claimant sustained any additional injury to the right upper extremity while he was treating claimant.[6]

27. Although Dr. Ketchum last saw claimant in January 2001, he was not asked nor did he volunteer an opinion whether claimant sustained any additional injury or functional impairment following October 1999 when he rated claimant.

[6] Ketchum Depo. at 22.

28. Claimant left respondent's employment in mid-January 2001 after performing the job of bagging rib fingers for several days and concluding he could not physically perform the job.

29. In March 2001, the Judge conducted another preliminary hearing. As a result of that hearing, the Judge ordered an independent medical evaluation for an opinion whether claimant had reached maximum medical improvement and, if not, what additional medical care was appropriate. In response to that order, Dr. Daniel M. Downs examined claimant on May 10, 2001, and recommended additional tests, including an EMG and nerve conduction tests. Nonetheless, the doctor rated claimant as having a 20 percent functional impairment to the left upper extremity, a 25 percent functional impairment to the right upper extremity and a seven percent whole body functional impairment due to the neck, all of which combined for a 30 percent whole body functional impairment according to the AMA *Guides* (4th ed.).[7]

30. Dr. Downs did not testify but the doctor's May 10, 2001, report is part of the record. Unfortunately, the doctor's report did not identify the accident date that produced claimant's functional impairment. On the other hand, the doctor noted claimant's history of injury as follows:

> Presently Mr. Magana is 55. He has had no isolated injury to his arm, shoulder or upper back where he is having problems. The history that he provides is that while working at Iowa Beef Processing as a packer that he has had increasing amount of upper back, neck and shoulder problems. Initially part of Mr. Magna's *[sic]* job was processing and carrying heavier boxes, 75 to 100 pounds. After processing and working in this position with a hundred boxes a day he started having increasing problems with his neck, upper back and shoulder region. He was then placed in a job cutting meat from the bone with repetitive use of his hands. From that task he went on to other tasks with repetitive use of his hands, arms, and shoulders.
>
> He developed increasing problems with his arm, region of the right shoulder and elbow. He was diagnosed with lateral epicondylitis and treated with cortisone and physical therapy as well as work restrictions and limitations.

[7] The Board notes the report contains a typographical error as it rates two right upper extremities but no left upper extremity. The parties would not agree as to which upper extremity had which impairment rating. But, in any event, the ratings combine for a 30 percent whole body functional impairment.

31. In May 2001, claimant obtained a job at a trailer court where he worked for one day before suffering a stroke.

32. On February 21, 2003, the Judge conducted one regular hearing in these claims. At that time, other than working at the trailer court the one day before his stroke claimant had not worked since leaving respondent's employment. Moreover, claimant was not looking for work as he believed he was unable to work due to the effects of his stroke. Claimant testified his mental functioning is now so impaired that he does not know what is going on around him and that he sometimes forgets to eat.

CONCLUSIONS OF LAW

For the reasons below, claimant is entitled to receive permanent partial general disability benefits for a 25 percent whole body functional impairment rating for the bilateral upper extremity injuries alleged in Docket Nos. 236,071, 241,633 and 256,300. Conversely, claimant's request for benefits for a specific accident on April 11, 2000, is denied.

1. Does the Board have jurisdiction to review the findings and conclusions entered in Docket No. 236,071 and Docket No. 241,633, when the claims were decided in one document along with the claim in Docket No. 256,300, which was the only docket number listed in the application for Board review?

The Board has held on numerous occasions that when multiple docketed claims have been combined or consolidated by an administrative law judge for purposes of litigation and award, all of the claims are subject to Board review when any of the combined claims are appealed.

It must be emphasized the Workers Compensation Act does not address combining and consolidating claims for litigation and award purposes. Likewise, no administrative regulations have been promulgated to address that subject. But it has been a long-standing practice of the administrative law judges to combine or consolidate claims when it appears the parties would benefit from such action or that the claims are so intertwined that combining or consolidating them would result in judicial efficiency.

Although Judge Avery entered a formal order consolidating the claims in Docket No. 236,071 and Docket No. 241,633, it cannot be argued that all three claims were not combined for hearing, taking evidence and for disposition. And, in fact, Judge Avery decided all three claims in one document.

Had Judge Avery entered a formal order consolidating all three claims, there would be no question that this Board has the jurisdiction to review all of the issues raised in these claims. In *Solis*,[8] the Kansas Supreme Court found that an assistant director had consolidated two claims for hearing and held all the issues in both claims were subject to review despite an application being filed to review the findings in only one of the two docketed claims. The Court stated, in part:

> Although only Hartford petitioned the Board for review, K.S.A. 44-551(b)(1) does not limit the Board's scope of review to issues raised in the written request for review. Rather, once a party files a written request for review of the administrative law judge's decision, the Board has the authority to address every issue decided by the administrative law judge. Because the two cases were never severed, the Board had jurisdiction to address any of the issues raised in the consolidated cases, and KLA was a proper party.
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> Further, it is clear that in addition to being consolidated, Docket No. 190,678 and No. 220,773 were inextricably intertwined. The damage to the glove and the duty to make repairs were either the responsibility of Hartford or KLA. The Assistant Director's finding in Docket No. 190,678, that Hartford was liable for repairs, necessarily led to the finding in Docket No. 220,773 that KLA was not liable. Were the Board to find that the Assistant Director had erred in holding Hartford liable, the Board would also necessarily have found that the Assistant Director had erred in absolving KLA of liability. Thus, Hartford's argument that KLA was not a proper party and had no stake in the proceedings is without merit.[9]

Interestingly, the Kansas Supreme Court's *Solis* decision does not indicate whether the assistant director entered a formal order consolidating the cases or whether the Supreme Court concluded the cases were consolidated for hearing as they were heard together.

In the three claims at hand, claimant alleged injuries from a combination of single accidents and a series of repetitive traumas to both upper extremities, both shoulders and the area of the upper back and neck for each working day through his last day of employment with respondent. Moreover, claimant also alleged the initial injury and symptoms of the right upper extremity caused him to overuse and injure the left upper extremity. And the Judge, after considering all the evidence, determined claimant sustained a series of repetitive traumas through his last day of work and determined the appropriate date of accident for the third claim was January 22, 2001, which was claimant's last day of work for respondent.

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[8] *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, 999 P.2d 921 (2000).

[9] *Id.* at 753-754 (citations omitted).

The Board concludes all three claims were combined and consolidated by the Judge despite the absence of a formal order addressing the three claims. The Board also concludes the claims were inextricably intertwined and, therefore, all three should be addressed in this appeal.

2. What is the nature and extent of injury and disability for claimant's alleged accidents?

The Board concludes that claimant initially injured his right upper extremity as the result of hitting his right arm on a metal object. At the time of that accident, claimant worked in respondent's packing department where he regularly lifted heavy boxes. The right upper extremity injury did not resolve and, in time, claimant also began experiencing symptoms in his right shoulder. Furthermore, the record establishes that over time claimant began using his left upper extremity to protect his right upper extremity, which, consequently, caused injury to his left upper extremity.

The Board concludes the left upper extremity injury resulted as a natural consequence of the right upper extremity injury. Accordingly, the Board finds that the bilateral upper extremity injuries should be treated as an injury to the whole body as provided by the appropriate version of K.S.A. 44-510e rather than as two separate scheduled injuries under the appropriate version of K.S.A. 44-510d.

Based upon this record, it is very difficult to identify a specific date as the ending date of claimant's repetitive use injury. Commencing in 1997, respondent assigned claimant a number of light duty jobs that he attempted to perform. But despite respondent's attempts to accommodate claimant, he injured his left upper extremity as a natural consequence of the injury to the right arm.

In *Treaster*,[10] which is one of the most recent decisions regarding the date of accident, the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

[10] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[11]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[12]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[13] in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

In the case at hand, the Board concludes claimant did not leave respondent's employment due to his upper extremity injuries as the medical evidence establishes claimant retained the ability to perform the job of bagging rib fingers. Therefore, it is not appropriate to use claimant's last day of working for respondent as the date of accident for purposes of computing his award.

The record, however, is not entirely clear when claimant was moved to a job in which he did not sustain repetitive trauma injuries. But the record does establish that after Dr. Ketchum rated claimant in October 1999, claimant performed either light duty jobs or regular duty jobs that had been specifically approved by Dr. Ketchum.

Furthermore, although Dr. Ketchum saw claimant after October 1999, the doctor did not testify that claimant sustained any additional injury or functional impairment. Conversely, the doctor specifically testified that claimant did not injure his right upper extremity after he began treating claimant and after restricting his work.

Based upon that evidence, the Board concludes it is more probably true than not that the work claimant performed for respondent after Dr. Ketchum's October 1999 functional impairment rating did not cause him further injury or impairment. Accordingly, the Board concludes the appropriate date of accident as disclosed by this record for the

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[11] *Id.* at Syl. ¶ 3.

[12] *Id.* at Syl. ¶ 4.

[13] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

bilateral upper extremity injuries is October 8, 1999, which is the date Dr. Ketchum wrote respondent rating claimant's functional impairment for bilateral bicipital tendinitis, lateral humeral epicondylitis and trigger fingers.

Claimant alleges that he sustained a distinct accident on April 11, 2000, injuring his neck, back, head and shoulders. The Board finds the evidence fails to establish that claimant sustained either permanent injury or impairment as a result of that alleged injury. Conversely, the record indicates claimant complained of pain around his shoulders and neck as early as July 1998 when he filed his first application for hearing with the Division of Workers Compensation. The Board concludes claimant's symptoms around his shoulders and neck are part of the overuse syndrome that was diagnosed and rated by Dr. Ketchum and, therefore, those ongoing symptoms are part and parcel of the bilateral upper extremity injuries claimant has sustained.

Because claimant has sustained a bilateral upper extremity injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. **In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[14] and *Copeland*.[15] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse

[14] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[15] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[16]

And the Kansas Court of Appeals in *Watson*[17] held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages, when a worker failed to make a good faith effort to find employment.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[18]

The Board concludes claimant failed to prove he made a good faith effort to retain his employment with respondent. Claimant was placed on a leave of absence after complaining he was unable to perform the job of bagging rib fingers, which required claimant to handle very small pieces of meat. The job, however, had been approved by both Dr. Ketchum and Dr. MacMillan and did not appear to violate the permanent work restrictions that Dr. Ketchum had recommended. The Board finds claimant has failed to prove that he was unable to perform that job and, therefore, the wages from the job of bagging rib fingers should be imputed to claimant for purposes of the wage loss prong of the permanent partial general disability formula.

The Board concludes claimant's imputed post-injury average weekly wage exceeds 90 percent of his pre-injury average weekly wage. Consequently, claimant's permanent partial general disability is limited to his whole body functional impairment rating, which the Board finds to be 25 percent.

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[16] *Id.* at 320.

[17] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[18] *Id.* at Syl. ¶ 4.

3. Did claimant provide timely notice for the alleged April 11, 2000, accident in Docket No. 256,300?

Claimant alleged he sustained an accidental injury on April 11, 2000, while lifting at work. The record, however, fails to establish that claimant provided respondent with notice of the April 11, 2000, incident within 10 days of when it occurred. Moreover, the record fails to establish any reason that would extend notice to respondent.[19] Consequently, the request for benefits for the alleged April 11, 2000, accident must be denied.

Additionally, the Board notes claimant also alleged a series of micro-traumas and accidents each workday after April 11, 2000. But, as indicated above, the record does not establish that claimant sustained any permanent injury from his work activities after that date as he was either working light duty pursuant to his medical restrictions or performing regular duty work that had been approved by his physician.

AWARD

WHEREFORE, the Board modifies the June 11, 2003, Award and sets aside the separate awards of disability compensation for two scheduled injuries to the upper extremities. In addition, the Board modifies the accident date and reduces claimant's permanent partial general disability from 71 percent to 25 percent.

Accordingly, in these three claims Roberto Magana is granted compensation from IBP, Inc., for an October 8, 1999, accident and resulting disability. Based upon an average weekly wage of $392.81, Mr. Magana is entitled to receive 103.75 weeks of permanent partial general disability benefits at $261.89 per week, or $27,171.09, for a 25 percent permanent partial general disability, making a total award of $27,171.09, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

[19] See K.S.A. 44-520 (Furse 1993).

Dated this ____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority's decision that all three docketed claims were so intertwined that respondent's request for Board review in Docket No. 256,300 provided jurisdiction to also review the consolidated Docket Nos. 236,071 and 241,633 for which no request for review was filed by either party.

The majority notes that if the Administrative Law Judge had entered an order consolidating all three claims there would be no question the Board would have jurisdiction to review the issues in all three claims. But that did not occur. Here, only Docket Nos. 236,071 and 241,633 were ordered consolidated by the Administrative Law Judge. For judicial economy, Docket No. 256,300 was heard on the same date as the other two claims but it was a separate and distinct claim.

More significantly, claimant's counsel agreed that Docket No. 256,300 was not inextricably intertwined with the two consolidated claims. In its original brief to the Board, the respondent noted that the awards entered in Docket Nos. 236,071 and 241,633 were final and not subject to review. In claimant's original brief to the Board, claimant agreed those decisions were final and further noted Docket No. 256,300 (an alleged accident date of April 11, 2000) was a separate claim. The claimant's brief noted:

> Mr. Magana had been found to be at maximum medical improvement in his first two cases, Docket No. 236071 and 241633, and was placed in a regular job of being a skinner's helper. **Claimant is in agreement with the Respondent that the Awards of Compensation entered by the Administrative Law Judge are**

> **final, but would contend that these cases were all prior to and separate from his industrial accident of April 11, 2000.**[20] (Emphasis added.)

The claimant did not request review of the awards entered in Docket Nos. 236,071 and 241,633 and explicitly abandoned any request for review of those claims in claimant's initial brief to the Board for the review in Docket No. 256,300. Moreover, it was the Board and not the claimant that raised the issue of jurisdiction to review the two consolidated claims at the originally scheduled December 9, 2003, oral argument on the respondent's requested review in Docket No. 256,300.

K.S.A. 2003 Supp. 44-551(b)(1) states that all final awards made by an administrative law judge shall be subject to review by the Board upon written request of any interested party within 10 days. The respondent's written request for review filed after the Administrative Law Judge's June 11, 2003, Award specifically listed only Docket No. 256,300. Both parties' original briefs only referenced Docket No. 256,300.

We would find that the issues in Docket No. 256,300 were not inextricably intertwined with the issues in the two consolidated claims. Absent a timely request for review, coupled with the claimant's admission that the decisions in the two consolidated claims were final, we would conclude the Board does not have jurisdiction to review Docket Nos. 236,071 and 241,633. We concur with the majority decision that the claimant failed to provide respondent with timely notice in Docket No. 256,300.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[20] Claimant's Brief at 3-4 (filed Aug. 27, 2003).